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No. 880

In the Supreme Court of the United States

October Term 1946

Robert J. Swem, Petitioner, v. The People of the State of Michigan.	Application for certiorari to the Supreme Court of the State of Michigan.

Brief Opposing Petition for Certiorari

Eugene F. Black
Attorney General of the
State of Michigan

Edmund E. Shepherd
Solicitor General of the
State of Michigan

Counsel for Respondent

FRANKLIN DE KLEINE COMPANY, STATE PRINTERS, LANSING, MICHIGAN
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No. 880

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Brief Opposing Petition for Certiorari

I

Counter-Statement of Matters Involved.[*]

The petitioner seeks a writ of certiorari to review an order (24) of the supreme court of the State of Michigan which denied a writ of *habeas corpus*[1] to inquire into the legality of his commitment to state prison pursuant to a judgment of the recorder's court of the city of De-

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[*] Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief refer to pages of the printed record of the court below.

[1] The petitioner attempted to prosecute the writ of habeas corpus under the Michigan Judicature Act, Chapter 87, §§ 7-12, et seq. (3 Mich. Comp. Laws 1929, §§ 15206-15211 [Mich. Stat. Ann. §§ 27.2250-27.2255]).

troit convicting him on his plea of guilty to an information that charged the crime of murder,[2] and sentencing him to serve a life term of imprisonment therefor.

The petition (2-10) for *habeas corpus* filed in the court below,[3] attempts to trace the course of events and procedure from petitioner's arrest by Detroit police officers on the 27th day of August 1931 (2-3) to the sentence imposed upon him on the 2nd day of September 1931 (3-5); it alleges that petitioner was unlawfully arrested, held *incommunicado*, transferred from one police station to another, unrepresented by counsel and without opportunity to consult with counsel; that he was not advised that he was entitled to the service of counsel, 'nor did he understandingly waive any of his rights to be represented by counsel'; and (4-5) that his restraint and imprisonment, therefore, is in violation of his constitutional rights guaranteed by the 5th, 6th and 14th Amendments to the Constitution of the United States.

The attorney general accepted (10-12) and filed an answer (12-20) prepared by the director of research of the trial court based upon her examination of court records and files in two criminal cases involving Robert Swem (the petitioner here), one for robbery, while armed (Mich. Penal Code, § 529 [Mich. Stat. Ann. § 28.797]), the other for the murder charged against petitioner and for which he was sentenced in this cause, upon her examination of a file of the homicide squad of the Detroit

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[2]

Michigan Penal Code, §§ 316-318 (5 Mich. Comp. Laws Supp. §§ 17115-316 - 17115-318 [Mich. Stat. Ann. §§ 28.548-28.550]).

[3]

It would appear that this petition was prepared and filed by the petitioner in proppia persona.

police department, upon her examination of files in the probation office of the court in such cases and a check of arrest records in the central bureau at police headquarters as well as records of an outlying police precinct (19). That document answers the petition for *habeas corpus* paragraph by paragraph, admitting, denying, or explaining the several allegations thereof.

Counsel for the petitioner filed a reply (20) to the State's answer, supported by petitioner's affidavit (21-23) in which he admits, explains, or denies affirmative averments of the answer and reiterates what he had already alleged in his petition.

On the 18th day of October 1946 the Michigan supreme court entered an order (24) denying the writ of *habeas corpus*, stating that 'we find no merit in defendant's position, he was not deprived of securing counsel, and under our decisions he cannot complain, particularly at this late date'.

The pending petition for certiorari was docketed in this Court on the 13th day of January 1947, and on the 3rd day of February 1947 the case of *De Meerleer* v. *Michigan* (October Term 1946, Docket No. 140) was decided. The Court thereupon extended time for filing this brief, to and including the 3rd day of March 1947.

II

Summary of the Argument.

The State's position, presently defined, is that decisive, substantial, non-federal grounds sustain the Michigan court in its order denying the writ of *habeas corpus.*

1. The substantial and decisive state grounds which might be the bases of the lower court's refusal of the writ are these:

(a) Prosecution of a writ of *habeas corpus* under Michigan law,[4] and decisions of her highest court,[5] is not the proper procedure to determine whether one convicted by a corut of competent jurisdiction of a criminal offense, has been deprived of any constitutional right, the appropriate Michigan procedure, followed by counsel for *De Meerleer,* being to move for leave to file a delayed motion for new trial in the court in which such a conviction has been had.

(b) The same, identical federal questions raised by Robert J. Swem in his petition for *habeas corpus,*

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[4]

The statute expressly forbids the following persons to prosecute a writ of habeas corpus: 'Persons committed for treason or felony', and 'Persons convicted, or in execution, upon legal process, civil or criminal'. Mich. Judicature Act, chap. 37, § 8 (3 Mich. Comp. Laws 1929, § 15207 [Mich. Stat. Ann. § 27.2251]).

[5]

Among them: In re Palm, 255 Mich. 632; In re Krusiewicz, 263 Mich. 74, 77-78; In re Offill, 293 Mich. 416, 419; In re Stone, 295 Mich. 207; In re Southard, 298 Mich. 75; and In re Dunning, 310 Mich. 1.

and the issues there presented for decision, had theretofore been finally adjudicated by the Michigan supreme court when, on the 9th day of January 1946, it denied his application for leave to appeal from an order of a judge of the trial court denying petitioner's delayed motion to vacate and set aside his plea of guilty, and the sentence imposed thereon.

(c) The period of time prescribed by law (28 U.S.C. § 350) for applying to this Court for a writ of certiorari (28 U.S.C. § 344) to review the foregoing order of the state supreme court (denying leave to appeal), expired on the 9th day of April 1946 without action on the part of petitioner or his counsel; and the petition for *habeas corpus* was filed in the Michigan supreme court on the 28th day of June 1946.

2. While federal questions were presented in the petition for *habeas corpus*, it does not affirmatively appear from the record that the court's decision of such federal questions was necessary to its determination of the cause.

3. Since the decision of the state supreme court denying *habeas corpus*, might have been either on the state grounds noted above, or on the federal grounds asserted in the petition, and since the state grounds are sufficient to sustain the order, this Court, upon authority of its own decisions,[6] 'will not undertake to review it'.[7]

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[6]

Klinger v. Missouri, 13 Wall. 257; Allen v. Arquimbau, 198 U. S. 149, 154-155; Lynch v. New York, 293 U. S. 52; Honeyman v. Hanan, 300 U. S. 14, 18.

[7]

Williams v. Kaiser, 323 U. S. 471, 477-479, citing the cases listed supra in footnote 6.

III

Argument.

Point One

Decisive, substantial, non-federal grounds sustain the Michigan court's order denying writ of habeas corpus.

It is, in the first place, by no means certain that the Michigan supreme court decided a federal question when it denied the writ of *habeas corpus,* stating in the order (24) that the court found 'there is no merit in defendant's petition, he was not deprived of securing counsel, and under our decisions he cannot complain, particularly at this late date'. There is no mention of due process, or denial thereof, and the decision may have turned on some question of fact. In the absence of a written opinion, it would be unfair to say that through the foregoing summary order the highest court of the State deliberately denied the petitioner due process of law.

Be that as it may, however, there are several decisive, substantial, non-federal grounds to sustain the order denying *habeas corpus*: (1) the procedure was not the proper or appropriate one to determine the question, and, under Michigan law, petitioner had no absolute right to prosecute the writ; (2) the federal questions raised in the petition had been considered when presented to the trial court in petitioner's motion for leave to file a delayed motion for new trial, and they were rejected by the supreme court when it denied application for leave to appeal therefrom; (3) no timely application was made to this Court for certiorari to review the foregoing order of the

Michigan court; the three-month period of time prescribed by law (28 U.S.C. § 350) for making such an application, had long since expired when Robert J. Swem petitioned the state supreme court for *habeas corpus;* and the matters and things set forth in his petition for *habeas corpus* had therefore been fully and finally adjudicated long before petitioner applied to the state court for *habeas corpus.*

1

Under Michigan law and judicial decisions, petitioner had no absolute right to prosecute the writ of habeas corpus; and such procedure is inappropriate.

Article 7, § 4, of the Michigan State Constitution, confers upon the supreme court 'a general superintending control over all inferior courts' and 'power to issue writs of error, *habeas corpus,* mandamus, quo warranto, procendo and other original and remedial writs, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only'.[8]

Exertion of such power is controlled by Chapter 37, §§ 7- 12, of the Michigan Judicature Act (3 Mich. Comp. Laws 1929, §§ 15206-15211 [Mich. State. Ann. §§ 27.2250-2255], and the procedure is there prescribed.

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[8]

The State Constitution (article 2, § 11) also provides that 'the privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion or invasion the public safety may require it'. Compare Federal Constitution, article 1, § 9, cl. 2. And circuit judges may also issue the writ in certain instances (State Const., article 7, § 10.

Section 7 of that chapter provides that

> "Every person committed, detained, confined or restrained of his liberty within this state, for any criminal or supposed criminal matter, or under any pretense whatsoever, *except in the cases in the next section specified*",

may prosecute a writ of habeas corpus (3 Mich. Comp. Laws 1929, § 15206 [Mich. Stat. Ann. § 27.2250]).

The next section (§8) provides in substance as follows:

> "The following persons shall not be entitled to prosecute such writ:
>
> 1. (Those held under federal process).
>
> 2. Persons committed for treason or felony, or for suspicion thereof, or as accessories before the fact to a felony, where the cause is plainly and specially expressed in the warrant of commitment.
>
> 3. Persons convicted, or in execution, upon legal process, civil or criminal . . . " (3 Mich. Comp. Laws 1929, § 15207 [Mich. Stat. Ann. § 27.2251]).

Section 11 prescribes the form of petition for habeas corpus, and provides what it must state, among other things that 'such person is not committed or detained by virtue of any process, judgment, decree or execution specified in the preceding eighth [8th] section' (3 Mich. Comp. Laws 1929, § 15210 [Mich. Stat. Ann. § 27.2254]).

And section 12 provides that the prit shall be granted without delay 'unless it shall appear from the petition

itself, or from the documents annexed, that the party applying therefor is, by the provisions of this chapter, prohibited from prosecuting the writ'.

The judicature act (Act No. 314, Pub. Acts Mich. 1915) revised and consolidated statues relating to practice and procedure, while chapter 37 thereof, applying to *habeas corpus*, reenacted chapter 134 of the revised statutes of 1946.[9] Thus for upwards of 100 years, without challenge on constitutional grounds, Michigan law has expressly forbidden collateral attacks upon final judgments in criminal cases, and it has provided as a substitute the remedy of new trial and appeal in the nature of a writ of error.[10]

The common-law writ of error *coram vobis* (or *coram nobis*,) 'has never obtained in this state, having been rendered obsolete by statutory methods of correcting error',[11] and in comparatively recent years the law, as interpreted by the state supreme court,[12] has permitted a person long convicted of crime and deeming himself aggrieved by some injustice to move the court of original

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[9]

See Michigan Comp. Laws 1857, § 5210 et seq.; idem., 1871, § 6903 et seq.; Howell's Stat. § 8554 et seq.; Comp. Laws 1897, § 9858; idem., 1915, § 13459, et seq.

[10]

Mich. Code of Criminal Procedure, chap. 10 (Mich. Comp. Laws 1929, § 17355 [Mich. Stat. Ann. § 28.1098] et seq.).

[11]

Dewey v. Otsego Circuit Judge, 250 Mich. 377, 379.

[12]

People v. Hurwich, 259 Mich. 361; People v. Burnstein, 261 Mich. 534.

jurisdiction for leave to file a delayed motion for new trial.[13]

Through a long, unbroken line of decisions,[14] the supreme court of this State has followed in principle the spirit, if not the strict letter, of these statutes, holding that the writ of *habeas corpus* cannot function as a writ of error, since it deals only with radical defects rendering a proceeding or judgment absolutely void.[15]

Michigan decisions on this subject fall roughly into four groups:

1. As a general rule, the court has merely held that the writ of *habeas corpus* cannot be made to take the place of a writ of error, and it has denied or dismissed the writ; it has, e. g., refused by such process to test the sufficiency of a ninformation charging crime;[16] it has refused through *habeas corpus* to pass upon the validity of an order made in pursuance of a statute, committing to state prison until further order one tried for murder

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[13]

This was the 'recognized Michigan procedure' followed by the petitioner in De Meerleer v. Michigan, October Term 1946, No. 140.

[14]

Departed from in some few instances as a matter of grace.

[15]

The 'radical defects' to which the court has repeatedly referred are, quite patently, those of jurisdiction. 'Habeas corpus is not available to one who has been convicted of crime by a court that has properly acquired jurisdiction and has not exceeded its powers'. In re Krusiewicz, 263 Mich. 74, 77. See Gillespie's Michigan Criminal Law and Procedure, Vol. I, p. 841, § 705.

[16]

It re Eaton, 27 Mich. 1.

and acquitted by reason of insanity, to be confined in an insane asylum adjoining the prison, ruling that the question should be raised by writ of error or other appropriate remedy;[17] it has declined to use the writ to determine the correct place of confinement under a sentence for crime;[18] it has refused in *habeas corpus* to pass upon the validity of a sentence;[19] or to consider questions arising out of the habitual criminal act; [20] or to release a prisoner held under the authority of Federal process;[21] or to inquire into the voluntariness of a plea of guilty;[22] and the court has held that a petitioner for *habeas corpus* should not be discharged from custody when by the return it appears that he has been convicted by a court of competent jurisdiction of an offense properly charged and which subjected him to the punishment meted out.[23]

2. The writ has been honored in a few exceptional cases where commitment to prison or other state institu-

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[17]
In the Matter of Underwood, 30 Mich. 502.

[18]
In the Matter of Coffeen, 38 Mich. 311.

[19]
In re Vitali, 153 Mich. 514; In re Guilmente, 201 Mich. 684.

[20]
In re Gardner, 263 Mich. 684. 122

[21]
In re Abbott, 267 Mich. 703, holding that such use of the writ is expressly forbidden by chapter 37, § 8, of the judicature act.

[22]
In re Offill, 293 Mich. 416.

[23]
In re Lewis, 124 Mich. 199, 201.

tion was issued by a court lacking jurisdiction,[24] or authority to sentence the prisoner to some particular jail or penitentiary;[25] or where the petition for *habeas corpus* challenged the authority of a Detroit police court to hear, try, and determine cases arising under the charter of that municipality;[26] or where it was contended that a certain jurisdictional statute had been repealed by subsequent legislation,[27] the court, however, declining to review other claimed irregularities in the sentence.

3. In comparatively recent years the court has decided questions of law presented in petitions for *habeas corpus*, but in each instance it has been careful to point out that such a writ cannot be permitted to function as a writ of error. In one case the court, having issued the writ of *habeas corpus* to the prison warden, and its ancillary writ of certiorari to the trial court, discharged the prisoner on the ground that his conviction for second felony, following conviction of unlawful possession of narcotic drugs, was void because the first offense was a misdemeanor, not a felony,[28] but it said:

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[24]

In re Morton, 10 Mich. 208; Hamilton's Case, 51 Mich. 174; Goodchild v. Foster, 51 Mich. 599; Palmer v. Judge, 83 Mich. 528; Ex Parte Allen, 139 Mich. 712.

[25]

In re Allen, supra; In re Bolden, 159 Mich. 629; In re Grabinski, 213 Mich. 108.

[26]

In re Bushey, 105 Mich. 64, 70, the court saying: 'Jurisdiction is the only question open on habeas corpus'.

[27]

In re Butler, 133 Mich. 485.

[28]

In re Moynahan, 255 Mich. 497.

> "In doing this we do not intend to substitute *habeas corpus* for appeal, but, having issued the writ, accompanied by a writ of certiorari, we have had to go behind the warrant of commitment and there find and we can now see the error we would have to find and see in case of an appeal".

In another case decided the same term,[29] the court considered several constitutional questions involving Michigan's habitual criminal law,[30] rejecting them as without merit, but it adhered to the general rule that the writ of *habeas corpus* cannot function as a writ of error.[31]

The petitioner in most of these cases and those hereafter cited, appeared *in propria persona* and it was probably for this reason that the court indicated its opinion on some of the questions raised; in no case was the petitioner discharged from custody.

Thus, in a later case,[32] the court expressed its opinion that the offense of breaking and entering a post office rented by the postmaster came within state jurisdiction following which it passed once more on certain phases of Michigan's habitual criminal law (its constitutionality

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[29]
In re Palm, 255 Mich. 632, 634. See People v. Palm, 245 Mich. 396.

[30]
Mich. Code of Criminal Procedure, chap. 9, § 12 (Mich. Comp. Laws 1929, § 17340 [Mich. Stat. Ann § 28.1084]).

[31]
Citing: Goto v. Lane, 265 U.S. 393.

[32]
In re VanDyke, 276 Mich. 32; certiorari denied, 290 U.S. 608.

and applicability), reasserting, however, that the writ of *habeas corpus* 'cannot function as a writ of error; neither may it serve to review or consider questions foreclosed by previous writs of error'.[33]

Other cases considered the sufficiency of informations,[34] but held that *habeas corpus* was not available; and passed upon the constitutional validity of Michigan's indeterminate sentence law,[35] saying, however,

> "We have thus repeatedly held that *habeas corpus* will not be permitted to perform the functions of a writ of error. . . . Although his remedy is not by *habeas corpus* and his petition for that writ must be denied, we shall, however, in this instance reexamine the question of the constitutionality of the indeterminate sentence law. *We do this in order that we may again show the futility of continued applications to this court, based upon the claim that the petitioner and others in like circumstances are illegally confined in State institutions*".

In the first of the last two cases of this kind decided,[36] the court held that under an information specifically charging the defendant with having committed the offense of incest with his daughter, where the jury con-

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[33] In re Brazel, 283 Mich. 632.

[34] In re Stone, 295 Mich. 207.

[35] In re Southard, 298 Mich. 75, 78; certiorari denied, 314 U. S. 659.

[36] In re Dunning, 310 Mich. 1.

victed him of such charge, it necessarily found defendant was the father of the girl involved, and that such a disputed question of fact could not be determined on *habeas corpus*, but should be raised on motion for new trial. 'The law is well settled that *habeas corpus* proceedings and the ancillary writ of certiorari are not a substitute for writ of error or appeal'.

And in the second case,[37] the court overlooked the rule 'often repeated here that the writ of *habeas corpus* cannot function as a writ of error', in order that it might consider important questions.[38]

Obviously the case at bar and those of like nature should be controlled by the Michigan rule which recognizes that the remedy of *habeas corpus* is inappropriate and unsuitable to determine questions involving disputed facts. The supreme court is not equipped for such a task, and reference proceedings are at best unsatisfactory. The printed record in this cause clearly indicates that the essential facts are disputed,[39] and we respectfully submit the trial court is the proper forum to resolve

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[37]

In re Elliott, 315 Mich. 662.

[38]

It should be noted that in the Elliott case (decided before this Court handed down its opinion in De Meerleer), the attorney general recommended that the writs issue, and that the matter be referred to a circuit judge.

[39]

The State's answer (12-19) denies many of the allegations of the petition for habeas corpus; it denies that the accused and his companions were held entirely incommunicado (14); it reveals that petitioner gave full details of the crime (14); and it shows that the trial judge safeguarded the rights of the accused.

the issues. It is only fair that the trial judge who is accused of denying fundamental rights should first have opportunity to investigate and if in error rectify the injustice.

2

The federal questions raised in Swem's petition for habeas corpus, had theretofore been determined by the state supreme court in its order denying leave to appeal, and since petitioner did not make timely application to this Court for certiorari, they are res judicata.

Petitioner alleged (5-6) to the court below that in September 1945 to moved the trial court to set aside his plea of guilty upon the ground that such plea was made in ignorance of his rights (5); that his petition was denied by the successor in office to the trial judge; that he applied to the Michigan supreme court for leave to appeal from such denial; and that on the 9th day of January 1946 the supreme court denied his application (6).

The records of the supreme court in the case of People v. Robert J. Swem (Calendar No. 43313½) disclose the following: that in accordance with court rule 60 petitioner's present counsel prepared and the trial court certified a concise statement of the proceedings and facts so far as they were material to an appeal, and that this concise statement was attached to his application for leave to appeal; and, further, that the concise statement so certified, recited that in September 1945 Robert J. Swem filed his motion to vacate plea and sentence upon the ground

> "that the plea of guilty entered by the applicant was made in ignorance of his rights, as provided by the Fourteenth Amendment . . . in that the applicant . . . at the time of his plea and sentence was a boy under the age of . . . 18 years, incapable of adequately making his own defense because of ignorance of the various degrees included in the charge placed against him, had a very limited education, was unable, because of financial reasons, to employ counsel, was totally and wholly ignorant of his right to demand that counsel be appointed to represent him, and, further, that the said defendant did not at any time knowingly, or intentionally, waive any right that he might have had to be represented by counsel".[40]

The records of the court below also show that petitioner's counsel filed in the supreme court of Michigan a brief in support of his application for leave to appeal, in which he relied upon certain decisions of this court,[41] and pointed out that decisions of the supreme court of the State of Michigan were in conflict;[42] and he argued that since the applicant's fundamental rights had been violated, he was entitled to a new trial.

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These allegations reappear (in somewhat less elaborate form) in the petition for habeas corpus (4-5), and almost verbatim in petitioner's affidavit (22-23) attached to his counsel's reply to the State's answer.

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Hawk v. Olson, 326 U. S. 271; Powell v. Alabama, 287 U. S. 45; Williams v. Kaiser, 323 U. S. 471; Rice v. Olson, 324 U. S. 786.

[42]

People v. Crandell, 270 Mich. 124; People v. Fries, 294 Mich. 382; People v. Haddad, two cases, 306 Mich. 556, and 561.

Petitioner's application for leave to appeal was denied without comment on the 9th day of January 1946, and he allowed the 90-day period prescribed by the Congress (28 USC § 350) to expire without applying to this Court for a writ of certiorari to review the order of the state supreme court denying leave to appeal (28 USC § 344).

The time within which a petition for writ of certiorari might have been filed in this Court expired on the 9th day of April 1946. Then, realizing his predicament, Swem started all over again by filing in the state supreme court the petition for *habeas corpus* now under scrutiny. But, following his own set pattern of tardiness, Swem did not file his petition for *habeas corpus* until June 28, 1946, two months and 19 days after expiration of the time for petitioning this Court for certiorari.

We, therefore, respectfully submit that decisive, substantial, non-federal grounds sustain the order of the court below.

Point Two

The state court's decision of federal questions was not necessary to determination of the cause; and since it might have been either on state or federal grounds, and since the state grounds are sufficient, the writ of certiorari should be denied.[43]

We have established the premise that state grounds (the impropriety of the remedy, and the former adjudication of the questions) are sufficient to sustain the order

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[43] This covers points 2 and 3 in the summary of argument.

denying *habeas corpus;* and it is perfectly plain that the decision of the state supreme court might have been on such non-federal grounds. Certainly the court's decision of such federal questions as were presented in the petition for *habeas corpus,* was not necessary to its determination of the cause. Indeed, the cause (insofar as federal questions were concerned) had already been determined over two months ago.

As this court has often said,[44] and recently repeated:[45]

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause",
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> *Honeyman v. Hanan,* 300 U.S. 14, 18.
>
> "And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it",
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> *Williams v. Kaiser,* 323 U.S. 471, 477.

The case of *Kaiser, supra,* closely resembles but may be distinguished from the case at bar. There, as here,

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[44] Honeyman v. Hanan, 300 U. S. 14, 18.

[45] Williams v. Kaiser, 323 U. S. 471, 477-479.

the petitioner for certiorari applied to the state court for a writ of *habeas corpus* to release him from imprisonment on the ground that he had been denied due process of law. There, as here, the state court denied the writ; but there the resemblance ceases. In the *William-Kaiser* case, this Court, upon search of the record, found no independent state ground to support the denial; and, as Mr. Justice Douglas said:

> "The Attorney General of Missouri only goes so far as to say that the petition did not state facts sufficient to justify the appointment of counsel under the Missouri statute. . . . And Missouri suggests no other state ground which might be the basis of the decision. That is to say, the only state grounds which have been advanced in support of the decision below appear to be insubstantial".

Here, the Attorney General of Michigan goes much further to assert that decisive and substantial non-federal grounds sustain the court below, and, to continue the paraphrase, Michigan suggests two decisive state grounds which might be the basis of the decision.

IV

Relief.

We, therefore, respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

Eugene F. Black
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan.

Counsel for Respondent